Supreme Court, U. S.
FILED
MAY 23 1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF

THE UNITED STATES

77-1669

NO. TERM, 1978

RALPH G. FAZIO and
MARY G. FAZIO,
Petitioners,
- vs -
ZONING HEARING BOARD OF
EAST MARLBOROUGH TOWNSHIP,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

WILLIAM J. GALLAGHER
RANDY L. SEBASTIAN
Attorneys for petitioners

OF COUNSEL:

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OPINIONS BELOW

Petitioners, Ralph J. Fazio and Mary G. Fazio, pray that this Court issue a Writ of Certiorari to review the Order of the Pennsylvania Supreme Court rendered on February 24, 1978. The Order of the Pennsylvania Supreme Court, denying the petitioners' Petition for Allowance of Appeal to that Court, as yet unreported, appears as Appendix "A" attached hereto. The Opinion of the Commonwealth Court of Pennsylvania, as yet unreported, appears as Exhibit "B." The Opinions and Orders of the Court of Common Pleas of Chester County and of the Zoning Hearing Board of East Marlborough Township are attached as Appendixes "C" through "F" respectively.

QUESTION PRESENTED

WHETHER CERTAIN PROVISIONS OF THE ZONING ORDINANCE OF EAST MARLBOROUGH TOWNSHIP, CHESTER COUNTY, PENNSYLVANIA, VIOLATE THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE 14th AMENDMENT OF THE CONSTITUTION IN THAT THOSE PROVISIONS PURPORT TO IMPOSE UPON THE USE OF MUSHROOM FARMING RESTRICTIONS WHICH ARE FAR STRICTER THAN THE LIMITATIONS PLACED UPON ANY OTHER USE IN THE TOWNSHIP, WHERE THERE IS NO LEGISLATIVE JUSTIFICATION FOR SUCH A DISTINCTION.

JURISDICTION

The Order of the Pennsylvania Supreme Court was entered on February 24, 1978. This Petition for Certiorari is filed less than 90 days from the aforesaid date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the United States, Amendment XIV, §1.

Section 305. Special Regulations Concerning Mushroom Plants. Mushroom plants may be located in East Marlborough Township subject to the following regulations:

1. Front Yard. There shall be a front yard on each street on which a lot abuts, the depth of which shall be at least two hundred and fifty (250) feet, measured from the center line of the right of way to the nearest point of any part of the mushroom plant including the wharf.

2. Side and Back Yards. Any mushroom plant shall be located at least one hundred (100) feet from all property lines.

3. No accessory buildings shall be closer to the street on which the front yard of any mushroom plant abuts than the front building line of the principal mushroom plant.

4. Compost Yard. A mushroom compost yard for the preparation of compost to be used off the premises is prohibited; provided however, that this shall not be construed to prohibit the isolated sale of unused compost, or the use of unused compost on any other premises owned or leased by the owner or the lessee of the premises on which the compost is processed.

5. No spent compost shall be stored in such quantities or in such a manner near roads or buildings so as to create a nuisance.

6. The set-back area surrounding mushroom plants may be used for any other purposes permitted in the R-A District; provided that all regulations applicable to such other use are met. Any dwelling constructed under this paragraph shall be considered a co-principal building for purposes of interpreting and

administering this Ordinance. Lot area and yard dimensions shall be shown on a plot plan which must accompany the application for building permit.

STATEMENT OF FACTS

Petitioners are the owners of an 8.9 acre tract of land in East Marlborough Township, Chester County, Pennsylvania, where they have grown mushrooms for sale since 1927. In 1960, the Township enacted a zoning ordinance which permitted mushroom plants to be located in the Township, but only pursuant to certain "special regulations concerning mushroom plants" as set out above. Most particularly, those regulations require at least a 250-foot setback requirement from any roadway, a requirement that is 2-1/2 times greater than the setback requirement for any other use

or structure in the Township; and, they also require a 100-foot setback from any property line, a requirement which is 3-1/3 times greater than the setback requirement for any other use or structure in the Township. At the time of the enactment of the ordinance, the petitioners had mushroom-growing buildings abutting neighboring Street Road which became nonconforming as to the setback requirements in that they were situate only 70 feet from the center of that roadway. On July 11, 1972, the petitioners filed an application with the Township requesting a "special exception or variance" to construct an addition to the existing

mushroom house. The first hearing on this request was held on August 14, 1972, but there then ensued what the Commonwealth Court of Pennsylvania has described as a "procedural nightmare." Essentially, the matter was first denied by the Township Zoning Hearing Board and was then appealed to the Court of Common Pleas of Chester County. That Court remanded to the Zoning Hearing Board, which held an additional hearing and then made another return to the Court of Common Pleas of Chester County, which Court affirmed the denial of the special exception and variance. In addition, the Court of Common Pleas of Chester

County denied the petitioners' constitutional challenge to the validity of the ordinance which is herein raised. On appeal, the Commonwealth Court of Pennsylvania affirmed the Lower Court, and the Pennsylvania Supreme Court, on February 24, 1978, denied the petitioners' request for allowance of appeal. Neither the text of the East Marlborough Township Zoning Ordinance nor the record of the hearing in this matter contain any evidence or any legislative finding that there is any basis for the distinction in the foregoing ordinance between buildings used as mushroom farms and every other kind of building.

REASONS FOR GRANTING WRIT OF CERTIORARI

This Court long ago set out the parameters of permissible zoning legislation beyond which a municipality may not venture. In Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the Court faced its first challenge to a zoning ordinance and upheld the ordinance, finding that a municipality could validly restrict the use of land within its borders so long as the restriction bore a substantial relationship to the public health, safety, morals, or general welfare. In two opinions which followed soon after, however, the Court placed important limitations upon the

exercise of the municipality's police power. In Nectow v. City of Cambridge, 277 U.S. 183 (1928), the city of Cambridge, Massachusetts, enacted a zoning ordinance which, when applied to the specific property at issue in that litigation, had a substantially detrimental affect upon the property. In that case, the Court held that "the action of the zoning authorities comes within the ban of the 14th Amendment and cannot be sustained." Id. at 185. Similarly, in State of Washington, *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928), the Court again struck down a zoning ordinance finding that it violated

the provisions of the 14th Amendment. In Roberge, the municipality attempted to unreasonably restrict a home for the aged, and in striking down this unreasonable restriction, the Court noted:

> And, there is no legislative determination that the proposed building in use would be inconsistent with public health, safety, morals, or general welfare . . . . We find nothing in the record reasonably tending to show that its construction or maintenance is liable to work any injury, inconvenience or annoyance to the community, the district or any person.

Id. at 118-19.

The statements of the Court in Roberge apply with equal validity to the case at bar. In the case at bar, the zoning ordinance of East

Marlborough Township contains no evidence or legislative finding whatsoever with regard to the onerous distinction placed upon buildings used in mushroom farming operations. Similarly, the record will disclose that at neither of the hearings on the application did the Township place in the record any evidence of any kind tending in any way to substantiate the distinction. The only evidence in the record on the question of the effect of the proposed use on the public health, safety, or welfare was evidence presented by the petitioners, and all of that evidence tends to show that what the applicants propose

to do would have a beneficial effect on the public health, safety, and general welfare.

Although this Court neglected the entire area of zoning for some 50 years after the decisions in Village of Euclid and Nectow and Roberge above, the Court has recently returned to a serious consideration of important zoning issues. In Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), this Court, per Mr. Justice Douglas, reaffirmed the general holdings of Euclid. More recently, in Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977), and in Warth v. Seldin,

422 U.S. 490 (1975), the Court has addressed itself to very important issues dealing with racially discriminatory zoning ordinances. In Arlington Heights, the Court upheld the validity of an Illinois ordinance which had been challenged on the grounds that the effect of the ordinance was racially discriminatory. In Warth v. Seldin, the Court extensively addressed the issue of who are the proper parties, from the point of view of legal standing, to challenge zoning ordinances on racially discriminatory and other grounds.

The Court has seen fit to hear these recent zoning cases because of

the importance and impact of the issues involved therein upon large segments of the American public and because of the importance in the evolution of our law of a decision on the legal issues involved. For these same reasons, the Court should hear the instant matter. The ordinance involved in the case at bar constitutes a deprivation of due process rights of the petitioners and all other citizens of the United States residing in municipalities with the same or similar ordinances. To uphold the validity of the ordinance in the case at bar would be to permit a municipality to selectively and arbitrarily legislate out of its

boundaries any use which it chooses, without any justification for doing so, by the imposition of impossible restrictions. It is, of course, within the bounds of the municipality's police power to regulate uses within its boundaries and, in fact, to severely restrict them so long as there is evidence, either in the ordinance itself or in the record, that the ordinance bears some substantial relationship to the public health, safety, or general welfare. See Euclid and Village of Belle Terre, *ante*. However, it is equally clear that a municipality may not do so when there is no evidence that the proposed restriction bears any

substantial relationship to the public health, safety, and general welfare. See Nectow and Roberge, *ante*. The latter is the situation in the case at bar.

The recent cases addressed by this Court in the zoning area, explicated above, have dealt primarily with residential uses where the legal issues involved have had a substantial impact on a wide segment of the population. The legal issue involved with a commercial use in the case at bar has a similarly substantial impact on the same large segment of the population. It is plain that the effect of the within ordinance is to require

that a grower of mushrooms expend much greater sums of money in order to obtain sufficient land to comply with the provisions of the ordinance. Thus, the overall cost to produce mushrooms is greatly increased and, as always occurs in the natural capitalistic course, this increased cost is directly passed on to consumers of mushrooms, nationwide. Thus, the impact of the instant case passes far beyond the bounds of rural East Marlborough Township. The impact, in fact, reaches into every consumer's household in the United States and into every consumer's wallet.

It would, therefore, seem altogether appropriate and proper for this Court at this time to address itself to the issue thus presented under the Constitution of the United States.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court issue a Writ of Certiorari directed to the Pennsylvania Supreme Court to review the decision of that Court.

Respectfully submitted,

MacELREE, HARVEY,
GALLAGHER & KEAN, LTD.

BY: _____
WILLIAM J. GALLAGHER
RANDY L. SEBASTIAN
Attorneys for petitioners

Date: _____

A P P E N D I X " A "

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Sally Mrvos
Prothonotary

PHILADELPHIA, 19107
March 3, 1978

William J. Gallagher, Esq.
Randy L. Sebastian, Esq.
17 West Miner Street
West Chester, Pa. 19380

Re: Ralph J. Fazio and Mary G. Fazio v. Zoning Hearing Board of East Marlborough Twp.
No. 3307 Allocatur Docket

Dear Mr. Gallagher:

This is to advise you that the following Order has been endorsed on the Petition for Allowance of Appeal filed in the above-captioned matter:

"February 24, 1978
Petition denied
Per Curiam"

Very truly yours,
Sally Mrvos
Prothonotary

By/s/
Catherine E. Lyden
Deputy Prothonotary

CEL:ejh
cc: John S. Halsted, Esq.
David L. Myers, Esq.

APPENDIX "A"

A P P E N D I X " B "

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

NO. 2228 COMMONWEALTH DOCKET, 1976

RALPH J. FAZIO and MARY G. FAZIO,
Appellants,

- vs -

THE ZONING HEARING BOARD OF EAST MARLBOROUGH TOWNSHIP,
Appellee.

BEFORE: HONORABLE JAMES C. CRUMLISH, JR., Judge
HONORABLE ROY WILKINSON, JR., Judge

ARGUED: October 3, 1977

OPINION

OPINION BY JUDGE WILKINSON, JR.
FILED October 26, 1977

This is an appeal from a decision by the Court of Common Pleas of Chester County affirming the denial of a variance or special exception by the Zoning Hearing Board (Board) of East Marlborough Township (Township).

Appellants are the owners of an 8.9 acre tract in the Township where they have grown mushrooms for sale since 1927. In 1960 the Township enacted a zoning ordinance which permitted mushroom plants to be located in the Township. Section 305 of the Township Zoning Ordinance

provides in relevant part:

> "Special Regulations Concerning Mushroom Plants. Mushroom plants may be located in East Marlborough Township subject to the following regulations:
>
> "1. Front Yard. There shall be a front yard on each street on which a lot abuts, the depth of which shall be at least two hundred and fifty (250) feet, measured from the center line of the right of way to the nearest point of any part of the mushroom plant including the wharf.
>
> "2. Side and Back Yards. Any mushroom plant shall be located at least one hundred (100) feet from all property lines."

At the time, appellants had mushroom houses abutting Street Road which constituted a non-conforming use in that they were located 70 feet from the center line of the road. On

July 11, 1972 appellants filed applications on forms captioned "special exception or variance" to construct an addition to the existing mushroom house, also 70 feet from Street Road and 136 feet from the middle of Northbrook Road and a soil shed adjacent to the new mushroom house 116 feet from the center of Northbrook Road and 140 feet from the center of Street Road. A hearing was held August 14, 1972 where appellant appeared with his counsel and testified as well as several citizens who testified in opposition.

Thereafter ensued a procedural nightmare. On September 19, 1972[1]

the Board met in special session and issued a summary decision without opinion denying appellants' request. However, apparently unknown to the Board, attorneys for the Township and the appellants had at about the same time signed an undated stipulation which purported to waive the 45-day requirement for rendering Board decisions from the date of hearing and to give the Board "an additional seven (7) says (sic), until October 2, 1972 to file an order . . . ." The stipulation, however, contained an inherent inconsistency in that seven days after the 45-day period, which ended on September 28, 1972, would have been October 5, 1972.

The Board rendered an order and opinion denying a variance October 5, 1972. Appellants received notice of this decision October 31, 1972 and thereafter filed an appeal with the Chester County Court of Common Pleas. The court rendered a decision on December 14, 1973 which remanded the matter to the Board ordering that an additional hearing be held within 30 days and a supplemental decision[2] to be returned to the court within 60 days. The hearing was not held within the time stipulated.[3] A belated hearing was held March 24, 1975 (which appellant unsuccessfully sought to enjoin) wherein appellant took the

position it was not timely held and therefore improper and refused to participate. The Board rendered a decision based on that hearing August 26, 1975 denying a special exception and finding the ordinance constitutional. The decision was returned to the court on November 25, 1975. On November 22, 1976 the court affirmed the decision of the Board.

From this tortured history, appellants have raised a number of objections which we will consider seriatim.

I

Appellants contend they are entitled to a decision in their

favor by reason of Section 908(9) of the Pennsylvania Municipalities Planning Code (Code), Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §10908(9), because the Board failed to render a decision within 45 days after the last hearing before the Board. That hearing was held August 14, 1972 and the 45 days ended September 28, 1972. (We note this section also permits the parties to waive this period by a stipulation in writing.) Conceding the genuineness of the stipulation waiving the September 28, 1972 deadline, appellants contend the October 2, 1972 date is the operative extension of the deadline

rather than the seven days or October 5, 1972 date. We find this argument not persuasive since the record indicates appellants' attorney expressly states in a letter to the Township's solicitor accompanying the stipulation that "an additional seven (7) days" was granted for the Board to file an order. This letter is in the record as exhibit B10. Appellants have thus resolved the ambiguity against themselves and accordingly we find the Board made a timely decision by its order of October 5, 1972.

II

The appellants next contend that the failure of the Board to meet the

time requirements specified in the Court order for a supplemental hearing and additional findings should result in a decision in their favor. The Code makes no such provision. At the court of common pleas level appellants had other procedural remedies available to enforce the court order either by mandamus or contempt action. However, as noted by Judge Pitt in the court below, appellants were aware of the court order for 15 months and did nothing to enforce it.

III

Appellants next contend that the Township Zoning Ordinance is unconstitutional in that it purports to require greater setback distances

for buildings of mushroom plants or farms than any other kinds of buildings. Since neither appellants nor the Township presented any evidence on the issue of the constitutionality of the setback requirements our review is limited to whether the regulation is invalid on its face. Appellants rely on Eller v. Board of Adjustment, 414 Pa. 1, 198 A.2d 863 (1964), where our Supreme Court in an almost identical factual setting found setback requirements of 500 feet and 100 feet arbitrary and unreasonable and constituted a taking of property without due process of law. In our view, however, we do not believe the

decision in Eller requires a similar result here.

The mushroom grower in Eller whose mushroom house was located 400 feet from the road and 180 feet from the nearest property line would have easily met the 250 and 100 feet setback requirements of the East Marlborough Township Ordinance. As noted in Eller the burden of proving the unconstitutionality of a legislative enactment is on the party so asserting. In regard to zoning classifications this Court has said such enactments are largely a matter of legislative judgment and this function should not be interfered with unless it is obvious

the classification has no substantial relationship to public health, safety, morals or general welfare. Appeal of Mobil Oil Co., 21 Pa. Commonwealth Ct. 295, 345 A.2d 313 (1975). Absent any evidence in the record to the contrary, we cannot say the regulation here is so restrictive it presents an unreasonable and arbitrary classification. Mushroom plants are not totally excluded in the Township by reason of the regulation. Rather, mathematical calculations show that a conforming mushroom plant could be located on a four acre-tract in the Township, compared to the 68 minimum acres required in Eller, supra.

As the court noted in Eller, the mushroom industry, in particular the composting operation, is one that may require special regulation. Absent any evidence explaining appellants' position as to these particular setback requirements, we cannot say the regulation is on its face arbitrary and unreasonable.

IV

Appellants finally contend they should have been granted a special exception for the two buildings as an extension of an existing non-conforming use. Although the Board initially denied appellants' request on the ground the application was for a variance, in its supplemental

decision it also denied the application as a special exception based on the conditions contained in Section 603.5 of the ordinance. Ordinarily, once an applicant for a special exception shows that the proposed use is permitted, the burden shifts to the opponent of the exception to show the use would not violate the health, safety or welfare of the community. B & B Shoe Products Co. v. Zoning Hearing Board, 28 Pa. Commonwealth Ct. 475, 368 A.2d 1332 (1977). But this rule is viewed in the light of the policy of the law to restrict closely such non-conforming uses and to strictly consture (sic.) provisions

which provide for their continuance. Hauser v. Borough of Catasauqua Zoning Hearing Board, 20 Pa. Commonwealth Ct. 313, 341 A.2d 566 (1975). Thus, it is clear that the mere showing of an existing non-conforming use does not automatically entitle appellants to a special exception. Altemose Construction Co. v. Zoning Hearing Board, 3 Pa. Commonwealth Ct. 328, 281 A.2d 781 (1971). Had appellants sought only to extend non-conforming setback on Street Road we would have precisely the question we left unanswered in Altemose. However, appellants building plans show both buildings would have created an entirely new non-conforming setback

with respect to Northbrook Road and thus falls squarely within the rule in Altemose, supra, that a non-conforming setback involving greater encroachment may properly be denied.

Although the party seeking a special exception does not have to show undue hardship as in the granting of a variance, we believe the foregoing indicates the Board may deny a special exception upon a finding of increased encroachment or surrounding circumstances. In its findings the Board took note of the protests of residents who objected to appellants' mushroom operations being conducted so

close to public roads and the availability of other sites on appellants' land where the buildings could be constructed in conformance with the setback regulation. Thus we believe the Board did not abuse its discretion in denying the exception.

Accordingly, we will enter the following

O R D E R

NOW, October 26, 1977, the decision of the Court of Common Pleas of Chester County, No. 201, dated November 22, 1976 is hereby affirmed.

/s/
Roy Wilkinson, Jr., Judge

---

[1]The decision was apparently misdated August 19, 1972 according to the Board and reflects a meeting held September 19, 1972.

[2]The Board was ordered to consider four questions or matters: 1) to supply certain exhibits including the Township ordinance; 2) to consider the constitutionality of the ordinance pursuant to Section 910 of the Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §10910; 3) to hear additional evidence concerning the stipulation and decision of the Board; and 4) to consider whether or not the appellants were entitled to a special exception as a valid extension of an existing nonconformity.

[3]The record does not explain why the Board failed to learn of the order until almost a year had passed.

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

NO. 2228 COMMONWEALTH DOCKET 1976

RALPH J. FAZIO and MARY G. FAZIO,
Appellants
- vs -
THE ZONING HEARING BOARD OF EAST MARLBOROUGH TOWNSHIP,
Appellee.

O R D E R

NOW, October 26, 1977, the decision of the Court of Common Pleas of Chester County, No. 201, dated November 22, 1976 is hereby affirmed.

/s/
Roy Wilkinson, Jr., Judge

CERTIFIED FROM THE RECORD

OCT 26, 1977

/s/ Francis C. Barbush
Chief Clerk

A P P E N D I X " C "

IN THE COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA

NO. 201 November Term, 1972

Ralph J. Fazio and Mary G. Fazio,
Appellants

- vs -

East Marlborough Township,
Appellee

OPINION

Appellants, Ralph J. Fazio and Mary G. Fazio have appealed from a decision of the Zoning Hearing Board ("Board") of East Marlborough Township ("Township"), Chester County, Pennsylvania, denying appellants

APPENDIX "C-1"

a variance and/or special exception to permit the construction of a soil shed and double mushroom house on a tract of land zoned R-A, Residential-Agricultural. Although this is a use which is permitted in an R-A zone, Appellant seeks relief from the 250' front yard setback requirement imposed by Section 305.1 of the Zoning Ordinance of the Township.

In order to understand the factual and procedural history of this case, it is necessary to recite the convoluted calendar of events leading to this disposition. Appellants made application to the Board for the variance/special exception in July of 1972. A

hearing was held on August 14, 1972. A decision denying relief was rendered in summary fashion bearing date of August 19, 1972, but it appears that this was a typographical error, the correct date being September 19. Some time prior to this, an undated Stipulation of Counsel was entered, waiving the forty-five (45) day requirement for rendering decision imposed by the *Act of July 31, 1968*, P.L. 805 §908(9); 53 P.S. §10908(9) (Municipalities Planning Code, "MPC") and allowing seven (7) additional days. By Opinion and Order dated October 5, 1972, the Board denied relief to the Appellants. Appellants

did not receive copy of the first decision until September 29 and the second one until October 31. This appeal followed.

Upon initial review, this Court remanded the matter to the Board on December 14, 1973, under Order to conduct a Supplemental Hearing within thirty (30) days and render a Supplemental Decision within sixty (60) days thereof. The purpose of the remand was fourfold. First, the parties were to make the record complete by introducing into evidence a copy of the Zoning Ordinance, and were to provide the Court with exhibits T-1 and T-2, which were accepted into evidence

but not contained in the record. Second, the constitutionality of the setback requirements were to be considered. Third, the Board was to take testimony as to what occurred concerning the rendition of the decision from the time of the zoning hearing until the Appeal. Finally, the Board was to consider the issue of a special exception as an extension of a prior nonconformity.

That hearing was not held until March 24, 1975. Appellants objected to the hearing as not being timely and offered no testimony. The Board stood on the existing record as to the substantive issues, offered the Ordinance into evidence, explained

that T-1 and T-2 were actually A-1 and B-3 which were part of the record, and counsel for both parties agreed to resolve the time lags of the first hearing by way of Stipulation. Finally, on August 26, 1975, the Supplemental Decision was rendered. The record was returned to us for disposition on January 21, 1976.

No testimony was taken by the Court, and accordingly, our duty is to determine whether the Board abused its discretion or committed an error of law. *Campbell v. Zoning Hearing Board of Plymouth Township*, 10 Pa. Commonwealth 251 (1973).

We must first deal with procedural matters before moving on to the substantive aspects of this Appeal. Appellants claim that their relief should be deemed granted due to the Board's failure to hold a timely hearing in accord with this Court's Order dated December 14, 1973. Appellants argue for this sanction by analogy to §908(9) of the Municipalities Planning Code, supra. This argument is rejected. Appellants were aware of the terms of the Court Order for over one year, yet did nothing to enforce it. They could have sought mandamus or even pursued a contempt action, yet did nothing. The relief sought is

discretionary with this Court and while, under these circumstances such delay is unjustifiable and certainly not to be condoned, it does not require that such relief be automatically granted.

The next issue is the delay involved in the original Board decision. It appears from the record that there were two decisions, one on September 19, 1972, and one on October 5, 1972. The first decision was well within 45 days from the hearing as required by statute and the second decision was consistent with the Stipulation of Counsel. Considering further, even though notice of both decisions was tardy

in reaching Appellants, it is settled law that the notice provision of §908(10) of the Municipalities Planning Code is directory, not mandatory, and the sanctions of §909(9) of the Municipalities Planning Code do not apply. *Limekiln Golf Course, Inc. v. Zoning Board of Adjustment of Horsham Township*, 1 Pa. Commonwealth 499 (1971); *Foltz v. Monroeville et al.*, 5 Pa. Commonwealth 305 (1972).

Appellants challenged the Board's consideration of an Affidavit from former counsel for the Township to explain the time lags from the date of the initial hearing until the appeal, alleging this denied them

the right of cross-examination. We note that the use of the Affidavit was perhaps not in accord with the statement of agreement as to the method in which this issue would be handled as set forth at the last hearing before the Zoning Board. We observe also that the Affidavit was rendered by a member of the Bar and as such, a sworn officer of the Court. We see from the Brief of the Appellee, although this is admittedly a matter dehors the record, that opportunity to dispute the contents of the Affidavit was thrice offered to Appellants and left unanswered. Since this Court ordered the further inquiry

on this issue, we deem it within our power to approve the use of the Affidavit particularly where the Appellants elected to produce no testimony thereon at the subsequent Court ordered hearing. In any event, we think the discussion of the applicable law in the paragraph last above preceding indicates the issue to be moot since the parties agree as to the existence of a Stipulation for a seven (7) day extension of the forty-five (45) day time limit for the rendering of decision by the Zoning Hearing Board and that decision of October 5, 1972, fell within the time period as extended.

Turning now to the substantive issues, the variance was properly denied. Economic hardship alone does not justify a variance. *O'Neill v. Zoning Board of Adjustment*, 434 Pa. 331 (1969); *Bilotta v. Haverford Township Zoning Board of Adjustment*, 440 Pa. 105 (1970). Nor is the setback requirement unconstitutional. The issue of constitutionality of a zoning ordinance may be raised in an appeal to a Court of Common Pleas even if not heard before the Board. The burden of proving unconstitutionality is on the party so asserting. Appellants have not met this burden, and in comparison to *Eller v. Board of Adjustment*, 414 Pa. 1 (1964),

where a 500' setback and 100' side and back line requirement for mushroom houses was held unconstitutional, the instant ordinance does not appear unreasonable. Finally, it was not error of law for the Board to refuse to allow the buildings as a reasonable extension of a prior nonconformity. (Extensions of nonconforming yard requirements do not have to be allowed if they increase the nonconformity, as this certainly would. *Altemose Construction Co. v. Zoning Hearing Board*, 3 Pa. Commonwealth 328 (1971).)

ORDER

AND NOW, to wit, this twenty-second day of November 1976, the decision of the Zoning Hearing Board of East Marlborough Township is hereby affirmed, and the Appellants' Appeal is DISMISSED.

By the Court:

(s) T. A. Pitt, Jr., J.

(Seal)

APPENDIX "C-14"

A P P E N D I X " D "

IN THE COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA

NO. 20 NOVEMBER TERM, 1972

Ralph J. Fazio and Mary G. Fazio,
Appellants,

- vs -

The Zoning Hearing Board of East Marlborough Township,

ORDER

AND NOW, to wit, this fourteenth day of December, 1973, after review of the entire record, the matter is remanded to the Zoning Hearing Board of East Marlborough Township to consider upon the following questions and requirements:

APPENDIX "D-1"

1. The record as presented to this Court does not contain Exhibits T-1 and T-2 which were offered and accepted into evidence at the hearing before the Zoning Hearing Board. The record is likewise incomplete because a copy of the Zoning Ordinance of East Marlborough Township was not introduced into evidence. The parties may make these items part of the record by way of stipulation or the Zoning Hearing Board at additional hearing will give the parties the opportunity to make these items part of the record.

2. The constitutionality of the setback requirements of the Zoning Ordinance as here applied was not

APPENDIX "D-2"

considered in the decision of the Zoning Hearing Board. The said Zoning Hearing Board is directed to make determination of the validity of those requirements of the Zoning Ordinance pursuant to the *Act of July 31, 1968*, P.L. 805, art. IX, Sec. 910, as amended; 53 P.S. Sec. 10910. The Zoning Hearing Board shall afford the parties an additional hearing on this point, if same be requested.

3. The Appellant has claimed entitlement to the variances requested because the Zoning Hearing Board failed to file its decision within the period prescribed by the Statute. The Zoning Hearing Board is directed

to hold an additional hearing and there to afford the parties the opportunity to produce testimony as to what occurred concerning the rendition of the decision from the time of the zoning hearing unto the Appeal to this Court.

4. The applications herein filed to the Zoning Hearing Board are captioned Special Exception as well as Variance. The record herein indicates the possible nonconformity of the existing buildings on the property in question with the setback requirements of the Ordinance. The Zoning Hearing Board is directed to consider, under the Township Zoning Ordinance, and the applicable law and

such other evidence as the parties may present at additional hearing hereon, whether or not the Appellant is entitled to the grant of a special exception as a valid extension of a nonconformity.

Pursuant to the directions of this ORDER, the Zoning Hearing Board of East Marlborough Township is directed to schedule an additional hearing within thirty (30) days of this date and to make supplemental decision within sixty (60) days of this date and return the entire record to this Court immediately thereafter.

By the Court:
(s) T. A. Pitt, Jr.
Judge

(Seal)

APPENDIX "D-5"

A P P E N D I X " E "

Supplemental Decision of the Board

IN THE COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA

No. 201 November Term, 1972

RALPH J. FAZIO and MARY G. FAZIO,
Appellants,

- vs -

THE ZONING HEARING BOARD OF EAST MARLBOROUGH TOWNSHIP,
Appellee.

To comply with an Order of the Chester County Court of Common Pleas dated December 14, 1973, in regard to the above appeal, the Zoning Hearing Board of East Marlborough Township enters the following:

SUPPLEMENTAL DECISION

A public hearing was held on March 24, 1975, at which time additional testimony was taken on the

basis of, and in response to, the above-mentioned Order of the Court. A stenographic transcript was made of that hearing, and a copy of same is returned to the Court along with this Supplemental Decision.

Considering the various questions and requirements raised in said Order, the Zoning Hearing Board of East Marlborough Township says:

1. A copy of the Zoning Ordinance of East Marlborough Township is returned to the Court, this being the Zoning Ordinance as it was at the time of the initial hearing on this matter on August 14, 1972. (There have been subsequent amendments made to said Zoning Ordinance, but

the Zoning Ordinance returned with this Supplemental Decision is that which was in effect as of August of 1972.)

Concerning the two Exhibits identified as T-1 and T-2, the Board notes that T-1 is described as a Plan in the stenographic transcript made by Knipes-Cohen Associates of the August 14, 1972, meeting. This Plan is further described by the testimony of Ralph J. Fazio, one of the Appellants, as being ". . . a print of the three double block mushroom house, with concrete wharf, and plan of the new dirt shed, and also with the new building." (See Page 26 of transcript of August 14, 1972, meeting.)

This particular item cannot be located after a diligent search by the Board of its records, but it is respectfully suggested that the Plot Plan identified as Exhibit A-1 in said transcript shows the existing and proposed structures on the Appellants' property in a proper and meaningful fashion in the absence of the missing plan.

As for the other Exhibit, T-2, that is noted in said transcript as being an "Application for special exception by Mr. Fazio." The Board suggests here that an error was made by the stenographer who prepared the transcript of the August 14, 1972, meeting in that there is an

individual Exhibit which is already part of the record before the Court marked B-3; that Exhibit is an application dated July 1, 1968, by Ralph J. Fazio and Mary G. Fazio for a special exception or variance. However, in the actual transcript on page 1A, the stenographer notes that Exhibit B-3 is a letter to the Zoning Hearing Board from Mr. Edmond Pfeifer. That letter was in fact included in the record to the Court but has the Exhibit number of B-3A on it and not B-3. The Board might refer the attention of the Court to page 58 of the transcript of the August 14, 1972, meeting on which will be seen certain changes

that were made to the transcript apparently to correct this error. (The Board is not aware of how those changes were made to the transcript). Therefore, regarding Exhibit T-2, the Board assumes that the transcript should have identified the Application for special exception by Mr. Fazio B-3 and not T-2, while the letter to the Zoning Hearing Board from Mr. Edmond Pfeifer should have been identified as B-3A and not B-3.

2. The Zoning Ordinance of East Marlborough Township requires front yards for mushroom plants of at least 250 feet and side and back yards of at least 100 feet. (See Section 305(1) and (2).) In their

appeal, Appellants raise the question of the constitutionality of the set-back requirements as they apply to mushroom growing operations. The Board would note here that the Appellants presented no testimony and no other evidence at the public meeting of August 14, 1972, on this issue. At the subsequent public meeting on March 24, 1975, Appellants, through their attorney, Anthony W. D'Onofrio, Esquire, offered no additional testimony as they made a general objection to the meeting. Therefore, the Board is without a record on which it can render a decision on the constitutionality of the setback requirements pursuant to

the Act of July 31, 1968, P.L. 805, Art. IX, Section 910, as amended; 53PS Sec. 10910.

Indeed, the Board is inclined to repeat the words of Your Honorable Court in Waltz vs. Zoning Board of Adjustment, 15 Ches. Co. Rep. 285, (1967):

> "All presumptions are in favor of constitutionality of (a Zoning Ordinance). It may be held invalid only if it clearly, plainly and beyond doubt violates the constitution. He who attacks it assumes the heavy burden of proving beyond doubt that it is void". (15 Ches. Co. Rep. at 292)

The Board would respectfully suggest that there is nothing in the record on this matter to show

that the set-back requirements as set forth in Section 305(1) and (2) of the Zoning Ordinance are so clearly unreasonable to warrant the finding that such requirements are unconstitutional. Certainly, there is a world of difference in the set-back requirements for mushroom growing operations in the zoning ordinance of East Marlborough Township and those found to be unconstitutional by the Pennsylvania Supreme Court in Eller vs. Board of Adjustment of London Britain Township, 198 Atl. 2D, 863 (1964) where the Court also acknowledged that special regulations could be enacted on a reasonable basis to cover

mushroom farms. There being nothing in the record to show that the set-back requirements of the Zoning Ordinance of East Marlborough Township are unreasonable as they relate to mushroom farms, the Board would be overstepping its authority were it to determine that the same are unconstitutional. Appellants have not met the "heavy burden" which is theirs.

3. An Affidavit has been prepared by James E. McErlane, Esq., who represented East Marlborough Township at the time of the public hearing of August 14, 1972. That Affidavit is attached hereto and made a part hereof.

That Affidavit makes clear that the Board issued a decision on the application of the Appellants on or about September 19, 1972, which date was certainly well within the 45 day time period following the public hearing of August 14, 1972, in which such a decision must be issued. This decision was never revoked but was supplemented by an Order dated October 5, 1972, which was accompanied by Findings of Fact, Discussion and Conclusions of Law. This later supplemental Order, being issued on October 5, 1972, was issued the last day of the extended period of 52 days (45 days plus an extra 7 days) following the public

hearing of August 14, 1972, an extension of time to which agreement was given by Mr. McErlane on behalf of East Marlborough Township and by Anthony W. D'Onofrio, Esquire on behalf of the Appellants.
It is respectfully suggested that the date of "October 2, 1972" noted in the Stipulation of Counsel effecting this agreement was in error, as the 52nd day following August 14, 1972, is, in fact, October 5, 1972.)

4. No additional evidence was presented at the public meeting on March 24, 1975, on the question of the possible non-conformity of the existing buildings and the further question of whether the Appellants

were entitled to the grant of a special exception as a valid extension of a non-conformity.

It is the Board's conclusion that a special exception cannot be granted to the Appellants to extend a non-conformity on the basis of the Zoning Ordinance. Section 603(5) of the same provides that the Board can issue a special exception where a lot is ". . . of such shape or dimensions that the owner would have difficulty in providing the required open spaces . . . ." The record provides the Board no basis by which this conclusion can be reached.

Furthermore, the Board is aware of the decision in In re Yocum, 141 A2d 601 (1968) where the Pennsylvania Supreme Court permitted a natural structural change in a building which did not increase any non-conformity nor violate any provision of the applicable zoning ordinance. Such is not the case with the application of the Appellants as the result of the construction proposed (and, in fact, completed in the absence of a required building permit) by the Appellants would be a significant reduction in the size of an already too-small front yard, a fact which is noted on Appellants' applications.

To the extent that the existing violation of the setback requirements is increased by the proposed construction (which as noted, has been completed) of Appellants and to the extent that such increase is a significant one, the application for a special exception to extend a nonconformity must be denied, as has been done.

Respectfully submitted by the Zoning Hearing Board of East Marlborough Township this 26th day of August, 1975.

/s/
Gilbert M. Pratt, Chairman

/s/
Paul T. Simpers

/s/
Leonard R. Davidson

APPENDIX "E-15"

A P P E N D I X " F "

Order and Opinion of the Board

BEFORE THE ZONING HEARING BOARD

EAST MARLBOROUGH TOWNSHIP

CHESTER COUNTY, PENNSYLVANIA

IN RE: Applications of RALPH J. FAZIO and MARY G. FAZIO for a Variance and/or Special Exception from the Zoning Ordinance.

O R D E R

AND NOW, to wit, this 5th day of October, 1972, the Applications of Ralph J. Fazio and Mary G. Fazio for a Variance and/or Special Exception from the Zoning Ordinance which would permit the construction of a soil shed and an additional double mushroom house are denied. An Opinion incorporating Findings of

APPENDIX "F-1"

Fact and Conclusions of Law is attached hereto.

/s/
Gilbert Pratt, Chairman

/s/
Paul Simpers

/s/
Donald Sutherland

APPENDIX "F-2"

I. FINDINGS OF FACT

1. The property is owned by the Applicants, and consists of 8.9 acres.

2. Adequate notice was given of this hearing, as defined by applicable statutes and ordinances.

3. The property in question is in an R-A, Residence Agricultural District, as delineated by the Zoning Ordinance.

4. Applicant's property abuts on Northbrook Road to the east.

5. Applicant's property abuts on Street Road (Route 926) to the south.

6. On Applicant's property of 8.9 acres, there are currently

standing the following buildings: One structure consisting of five double mushroom houses; one structure consisting of three double mushroom houses; three trailers; and, one miscellaneous building . . . all related to the present use.

7. The distance measured from the proposed construction of the soil shed (marked x on Exhibit A-1) as measured from the centerline of Northbrook Road to the nearest part of the proposed building is 116 feet, and from Street Road it is 140.65 feet.

8. The distance from the proposed construction of the mushroom house (marked y on Exhibit A-1) is

136 feet as measured from the middle of Northbrook Road, and 70.65 feet from Street Road.

9. Applicant's primary purpose in building the mushroom house is economic.

10. Applicant's primary purpose in building the soil shed is economic with a secondary purpose of health considerations pertaining directly to the management of the mushroom business.

11. On July 1, 1968, Ralph J. Fazio and Mary G. Fazio made written application to the Zoning Hearing Board for this same property for the purpose of constructing a spray chamber to increase the flow of

fresh air and to help overcome the fly problem, which application was denied.

12. Despite denial of the application, Applicant did go ahead and construct the spray chamber in violation of the Township Zoning Ordinance.

13. On July 25, 1969, Ralph J. Fazio and Mary G. Fazio made written application to the Zoning Hearing Board for this property for the purpose of constructing a storage shed, which application was denied.

14. Both of these applications contain the signatures of Ralph J. Fazio and Mary G. Fazio.

15. Ralph J. Fazio discussed

construction of the soil shed in March, 1972, with the Township Zoning Officer but did not make application.

16. Mr. Fazio began building the soil shed in early June, before he made application to the Township to do so (Exhibit B-1 is dated July 11, 1972, and is signed by his attorney).

17. Mr. Fazio did not have a Permit from the Township to construct the soil shed, and was ordered to cease construction in June.

18. Mr. Fazio finally ceased work on August 7, and at that time portions of the back and side walls

had been completed. They are still standing.

19. The general character of the surrounding neighborhood is residential.

20. Mushroom plants are a permitted use in an R-A District.

II. DISCUSSION

The Applications for a Special Exception or Variance from the terms of the Zoning Ordinance are brought under Section 305, paragraphs 1 and 2. The Application makes reference to no other section of the Zoning Ordinance and does not refer to the Municipalities Planning Code.

Sole issues before the Board are the rights of the Applicant to either a Variance or a Special Exception.

The provisions of the Zoning Ordinance pertaining to R-A Districts do not authorize a Special Exception for mushroom plants. Accordingly, the Applicants have no rights to a Special Exception for either of the two proposed buildings.

The next question is whether either of the two Applications present situations where "owing to special conditions, a literal enforcement of the provisions of the Ordinance will result in unnecessary hardship" as set forth in Section 801.3 of the Zoning Ordinance.

The evidence clearly indicates that the Applicant's buildings abut on two roads. Section 305.1 states, "there shall be a front yard on each street on which a lot abuts, the depth of which shall be at least 250 feet, measured from the center-line of the right-of-way to the nearest point of any part of the mushroom plant including the wharf." Applicant's proposals do not meet the 250 foot requirement. Applicant owns a total of 8.9 acres on which there is ample room to construct the requested buildings. Moreover, Applicant concedes that the prime consideration in making these Applications is economic profit. That

is not hardship. Even if the Applicant's claim was reduced solely to economic hardship, this does not give him a right to a Variance. Drop v. Board of Adjustment, 6 Com. Ct. 64 (1972).

III. CONCLUSIONS OF LAW

1. Ralph J. Fazio and Mary G. Fazio are not entitled to a Special Exception.

2. Ralph J. Fazio and Mary G. Fazio have not shown sufficient hardship so as to justify the granting of a Variance.

3. These Conclusions of Law apply to both the Application

for construction of the soil shed and the Application for construction of a double mushroom house.

/s/
Gilbert Pratt, Chairman

/s/
Paul Simpers

/s/
Donald Sutherland

Fronefield Crawford, Jr., Esquire
10 North Church Street
West Chester, PA 19380

MacELREE, HARVEY, GALLAGHER &
KEAN, LTD.

BY: _____
RANDY L. SEBASTIAN, ESQUIRE
Attorneys for petitioners

Dated: _____